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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1270

MELVIN McCOWN, Petitioner,

vs.

HUMBLE OIL & REFINING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the District Court (App. Page 11 of Petition) is reported at 293 F.Supp. 444. The Opinion of the Circuit Court of Appeals for the Fourth Circuit (App. Page 17 of Petition) is reported at 405 F.2d 596.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Lower Courts' refusal to extend the warranty of seaworthiness should not be upheld when the uncontradicted facts clearly established that McCown was not doing seamen's work or incurring seamen's hazards when injured and further that the vessel on which he did shipyard work was out of

navigation at the time.

STATUTE AND REGULATION INVOLVED

None.

STATEMENT

Melvin McCown was a shipyard employee of Newport News Shipbuilding & Drydock Company. He brought suit against Humble Oil & Refining Company, owner of the Tank Vessel ESSO BERMUDA seeking damages for personal injuries sustained in the course of tank coating work being done aboard that vessel by Shipyard.

McCown's Complaint as originally filed asserted causes of action founded both in negligence and in unseaworthiness. He has since abandoned and dismissed the negligence count and thereafter sought a recovery against Humble founded only in unseaworthiness.

After the undisputed facts had been developed by the parties, both McCown and Humble moved for summary judgment. McCown's Motion for Summary Judgment contended that as a matter of law the warranty of seaworthiness did extend to him. Humble's Motion for Summary Judgment contended that as a matter of law the warranty of seaworthiness did not extend to McCown. These Motions were thus submitted to the District Court for a ruling upon the uncontradicted facts, with the sole question being not if, but to whom, summary judgment should be granted.

The District Court ruled that summary judgment be granted to Humble Oil & Refining Company, and the Appellate Court affirmed that decision.

The facts are totally uncontradicted.

Humble had contracted with Newport News Ship-

building & Drydock Company to perform extensive work on its vessel ESSO BERMUDA. Shipyard did the work between August 8, 1961 and September 12, 1961, a total of 36 days, and at a cost of $407,194. The extent of the work is found in Customer's Order No. 353-S (Defendant's Exhibit 5).

The accident involving McCown occurred September 7, 1961, while all work by Shipyard was still in progress. Vessel was in the water moored to a Shipyard dock with a partial crew on board. McCown's injury was related entirely to tank coating work in progress. Sandblasting of a tank floor had been completed and McCown was assisting in sucking up the sand residue that remained. A part of the sandsucking hose reportedly fell off of a beam on which it had been previously placed by a Shipyard employee. It struck McCown as he worked below it, injuring his back. All of this work was being carried out by Shipyard employees with Shipyard equipment. Humble only participated by sending around one or more inspectors whose sole function it was to examine the work completed by Shipyard and to approve that finished work if done to the inspector's satisfaction.

Upon arrival at Shipyard vessel's boilers were cut out and fires shut down. Thereafter, electricity, steam and fresh water were provided on board by Shipyard. The main engines were disabled and her boilers and valves overhauled. Men worked inside the main boilers. The main throttle for ahead and astern was disassembled and taken ashore to the Shipyard shop for repairs and replacement. Some members of the crew departed. Those who stayed engaged in maintenance work and remained solely for the convenience of Humble.

More than one-half ($241,605) of the total cost of Shipyard's work involved the sandblasting and then coating of 12 cargo tanks. This was

specialized work requiring special equipment (Shipyard laid out $392,603 for it) and specially trained personnel to handle it. This work was not seamen's work nor did the vessel have either the equipment or the personnel capable of performing such tank work. This was a specialized job requiring the vessel to be withdrawn from navigation and turned over to a shipyard which could furnish both the necessary equipment and the trained personnel. (Defendant's Exhibits 1, 2, and 3 - Affidavits of L. C. Robertson and of Paul J. McEwan).

The tank coating work done by Shipyard did not involve any equipment or crew of the ESSO BERMUDA. It may be briefly described by quoting from the testimony of L. C. Robertson, Shipyard's Vice President in charge of Ship Repairs, as follows:

> "5. The tank coating above referred to was developed to retard corrosion. In order to 'coat' a tank it must first be sandblasted down to the bare metal; then in order to keep the bare metal from rusting or oxidizing, before the coating is applied, the humidity in the tank must be kept at 40% or lower. The coating consists of an inorganic zinc silicate which is applied by spraying it onto the metal to a specified dry film thickness of approximately 0.005.
>
> 6. The tank coating done on the S/S ESSO BERMUDA in 1961 was a process developed in 1959-1960 and to the best of my knowledge has never been undertaken or performed by a ship's crew. This coating operation requires the use of specially designed equipment owned by Shipyard and operated by its specially trained personnel working under controlled atmospheric conditions." (Defendant's Exhibit 1 - Affidavit of L. C. Robertson 6/22/67).

Mr. Robertson made further reference to tank coating in his subsequent Affidavit:

"5. The tank coating work to the best of my knowledge has never been undertaken or performed by a ship's crew, was not developed until 1959-1960, requires specialized equipment (not to be found on merchant vessels) and trained shoreside personnel skilled in the handling and use of same. It is work beyond the capacity of vessels and their crews to accomplish on their own." (Defendant's Exhibit 2 - Affidavit of L. C. Robertson 9/21/67).

The Chief of Fleet Personnel for Humble testified as follows regarding merchant crew inability to do tank coating work:

"5. Tank coating was not work capable of performance by crew personnel aboard the ESSO BERMUDA since they had neither the training nor the equipment needed. Instead, specially trained shipyard personnel and special shoreside equipment were required for this work." (Defendant's Exhibit 3 - Affidavit of Paul J. McEwan).

And Curtis W. Keech, Jr., Inspector for Humble was questioned about how the internals and bulkheads of tanks were handled before the coating process was developed. His testimony on this is very pertinent:

(Pages 25 and 26)

"Q. I see and then when she was in the Shipyard, would repair work or overhaul work be done to the rusted portions of the tank? By that I mean would the rust be scraped and the tank then painted?

A. No, there's nothing -- nothing scraped or painted on a tank that's just the normal operation of a ship. This coating was just started to preserve the internals and bulkheads on the ship. But we never used any paint or anything in the tanks.

Q. What did you do to rusted areas of the internals of the tank before you started the tank coating process?

A. Just let them rust.

Q. Just let them rust?

A. Nothing -- there was never anything -- there was another product out on the market which was -- it's similar to our coating, it's similar to our coating that was used but you still had to blast the tank to white metals. There was nothing we used in our tanks and when it rusted away over a period of time, it would not pass Coast Guard and/or American Bureau of Inspection, then they would have to be renewed, if they wouldn't pass the American Bureau or the Coast Guard inspection.

Q. Was the - was the rusting of the tanks the normal customary thing to expect due to the use of the ship as a petroleum or fuel carrier?

A. Yes, before this coating program started."

(Defendant's Exhibit 10 - Deposition of Curtis W. Keech, Jr., portions of Pages 25 and 26).

Besides the coating work, some 99 other numbered items covering 50 typewritten pages were done by Shipyard on the vessel which included maintenance, additions, renewals and alterations.

While all of this was being done the vessel remained below full complement of crew. Since the ESSO BERMUDA was undermanned with the consent of her Master, she could not lawfully proceed on a voyage (See U. S. v. The Science (D.C. Pa. 1863) Fed. Cas. No. 16239).

ARGUMENT

No new principles of law are involved in this case. The Courts below recognized this to be so and properly applied already clearly established rules of law to a set of undisputed facts and then came up with the ruling in favor of Humble. No other result was possible.

The Courts below simply held that under the facts McCown did not qualify as a Sieracki seaman to whom the warranty of seaworthiness has been extended by this Court. Seas Shipping Co. v. Sieracki (1946) 328 U.S. 85, 66 S.Ct. 872. The lower courts did not thereby ignore the decisions of this Court since Sieracki or misinterpret them. Nor did the lower courts clash with any decisions of any other Circuit Court of Appeal which have considered the rights of shipyard workers like McCown.

The District Court also held that under the facts the vessel ESSO BERMUDA was out of navigation when McCown was injured and that he was not entitled to the warranty of seaworthiness for such additional reason. Again previous decisions of this Court were followed. And again the legal principles set out in decisions of the various

Circuit Courts of Appeal, including the Fourth Circuit, were applied properly.

In denying the warranty of seaworthiness to McCown, they did not leave him remediless by any means. He had his negligence remedy to pursue against Humble for money damages, only the facts of his accident did not permit it and he has abandoned that claim initially asserted. And he had and took advantage of his workmen's compensation remedy against Shipyard.

The case under consideration is thus of interest only to the parties involved and the Writ sought by McCown should be denied.

1. THE DECISION BELOW IS CLEARLY CORRECT.

Petitioner seeks to have this Court believe that the decisions below require shipyard workers to use only "traditional" work methods if they are to have the benefit of the warranty of seaworthiness. His description of such decisions is inaccurate, to say the least.

In both Courts petitioner argued that a vessel owner cannot avoid the warranty of seaworthiness simply by developing new work methods or providing new machinery for the performance of seamen's work. Neither Court disagreed with this legal proposition. But both found it not applicable in the light of the undisputed facts in the record.

Circuit Judge Butzner expressed it this way:

(405 F.2d 596, 598)

"--. McCown urges that the sandblasting and coating process for the tanks is simply a current method of

performing with modern machinery the traditional maritime tasks of a seaman - chipping and painting. He relies upon a number of cases which hold that the use of newly developed machinery to perform a seaman's task does not avoid liability for unseaworthiness. The difficulty with McCown's argument is not the principle of law upon which he relies, but the facts concerning the type of work being performed. The evidence disclosed that the tank coating process in which McCown was engaged had never been done by any seaman at any time. The work required equipment and techniques never possessed by seamen. It was not merely an improved method of preserving tanks, for previously no means of preservation was available. Formerly the tanks were allowed to rust until they became unserviceable and required replacement, a major undertaking not performed by seamen." (Underlining supplied).

The facts to which Judge Butzner referred in his opinion came from witnesses Curtis W. Keech, Jr., L. C. Robertson, and Paul J. McEwan.

Keech testified that before the tank coating process was developed, the internals and bulkheads of tanks on tank vessels were neither painted nor scraped by anyone. Rather such were allowed to rust until they would no longer pass Coast Guard inspection. When that occurred, the rusted bulkheads and/or internals were cut out and replaced in a shipyard. (Defendant's Exhibit 10 - Deposition of Curtis W. Keech, Jr., Pages 25 and 26).

L. C. Robertson testified that tank coating is a process developed only in 1959-1960 and never undertaken by a ship's crew. He said it required specially designed equipment owned by a shipyard

and specially trained personnel of that shipyard working under controlled atmospheric conditions. Such equipment is not to be found on merchant vessels. (Defendant's Exhibits 1 and 2 - Affidavits of L. C. Robertson 6/22/67 and 9/21/67).

And Paul J. McEwan testified that tank coating was not work capable of performance on the ESSO BERMUDA except in a shipyard. Because the crew of that vessel had neither the training nor the equipment on board with which to accomplish it. (Defendant's Exhibit 3 - Affidavit of Paul J. McEwan).

Petitioner concedes on Page 6 of his Petition that "The specific job of coating tank bulkheads had not been done by seamen --", then assigns as the reason why, "--because the paint was newly developed." He is correct in his concession that tank coating was and is not seamen's work, but his explanation has no support in this record. As already indicated about, tank coating was and is not done by seamen because they have neither the training nor the equipment for it.

Hence, it is totally clear that the tank coating work McCown was participating in was neither historically nor presently the work of seamen. He was not doing traditional seamen's work in a more modern efficient way because the traditional seamen never did any work at all toward preserving those tanks, instead simply watched them rust.

This Court in United N.Y. & N.J. Sandy Hook Pilots Assn. v. Halecki (1959) 358 U.S. 613, 79 S.Ct. 517 declined in any event to equate cleaning engines by use of carbon tetrachloride with any traditional duty of seamen to keep their ship clean. As in the case under consideration, the facts in Halecki established that the work of cleaning the generators could not even be done upon a ship ready for sea but required the work of a specialist and the use of special equipment from

ashore. This Court noted, with approval language used in the Court below that Halecki "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." (251 F.2d 708, 715). It concluded by saying that

> (P. 618) "--To extend liability for unseaworthiness to the decedent here would distort the law of Mahnich, of Hawn and of Sieracki beyond recognition.--."

What petitioner seeks is not to prevent a narrowing of the warranty of seaworthiness but to urge its expansion. As in Halecki, to grant the warranty to McCown will distort the law of Sieracki beyond recognition and extend this added protection to those who are doing work never done by seamen on the ESSO BERMUDA or anyplace else in the world.

Petitioner is not supported by his two main case authorities upon which he relies.

Lawlor v. Socony-Vacuum Oil Co. (2nd Cir. 1960) 275 F.2d 599 extended the warranty of seaworthiness to a shipyard worker injured while repairing cracks and leaks in tank bulkheads. The evidence clearly showed that such work on occasion was done at sea by the crew of that vessel using shipboard equipment. Thus it was apparent that the injured shipyard worker was doing seamen's work and entitled to his remedies. And further, the ship was undergoing only minor routine repairs with a full crew on board ready for sea.

And Allen v. Union Barge Line Corp. (5th Cir. 1966) 361 F.2d 217 extended the warranty to a shipyard worker but again because he was doing traditional seamen's work (assisting in the removal of a propeller shaft bearing in the course of routine uncomplicated annual maintenance and because the

vessel was still in navigation.

Contrary to the facts in these two cases, McCown presents facts showing that the work was not routine, was not traditionally or presently capable of performance by seamen, required the vessel to be out of service for 36 days, and cost close to half a million dollars ($407,000 plus) to perform. Many of the 100 items of work involved more than routine maintenance but consisted of additions and of replacement work. During the work performance the ESSO BERMUDA was physically unable to move under her own power and legally incapable of movement by virtue of insufficient crew. (See Title 46 USC §222; United States v. The Science (D.C. Pa. 1863) Fed. Cas. No. 16239).

It is therefore totally clear that the lower Courts did not, as petitioner asserts, refuse to consider modern work methods in place of less efficient traditional work procedures of seamen and to apply the same legal principles to both. What they did do was in line with the law as it has been developed and applied by the Courts since Seas Shipping Company v. Sieracki, supra.

2. SUMMARY JUDGMENT WAS OBVIOUSLY PROPER.

Petitioner appears to question the granting of summary judgment below. But when the Motions for Summary Judgment (as put forward by both parties) were argued in the District Court, counsel for petitioner told the Court that the only question was to whom summary judgment should be granted. He used this language:

> "--As the defendant has stated, and we agree with the defendant that there are enough facts, or we believe that there

> are enough facts, presented to the Court for the Court to make a decision as to whether or not the plaintiff was entitled to the warranty of seaworthiness." (Reporter's transcript of hearing on Motion for Summary Judgment, November 9, 1967, Volume II, Page 25).

Obviously petitioner's real complaint is that he should have been granted summary judgment rather than Humble. This is precluded by the comment of Circuit Judge Butzner in his opinion:

(405 F.2d 596, 597)

> "--The facts on which McCown bases his claim are uncontradicted, and there exist no conflicting inferences requiring that the case be submitted to a jury.--"

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 14, 1969

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